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IN THE

Supreme Court of the United States

No. 559

SAMUEL VOLTAGGIO,

Appellant,

vs.

NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey, and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

APPELLEE'S MOTION TO DISMISS APPELLANT'S APPEAL.

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Nicholas V. Caputo,
Hall of Records,
Newark, New Jersey.

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IN THE

Supreme Court of the United States

SAMUEL VOLTAGGIO, Plaintiff-Appellant, *vs.* NICHOLAS V. CAPUTO, County Clerk, County of Essex, State of New Jersey and ROBERT J. BURKHARDT, Secretary of State, State of New Jersey, Defendant-Appellees.	Civil Action. On Appeal. Notice of Motion to Dismiss.

Notice of Motion to Dismiss.

To: Abraham I. Harkavy, Esq.,
Attorney for Plaintiff-Appellant,
100 Evergreen Place,
East Orange, New Jersey.

Sir:

PLEASE TAKE NOTICE that Nicholas V. Caputo, County Clerk, County of Essex, State of New Jersey, the Defendant-Appellee, moves to dismiss the Appellant's appeal and to affirm the Opinion of the Court below, as the Federal questions here presented were not timely raised and that the said questions are not substantial.

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Nicholas V. Caputo.

Appellee's Motion to Dismiss Appellant's Appeal and to Affirm the Opinion of the Court Below.

Appellee submits this brief on motion to dismiss appellant's appeal and asserts that the Federal questions here presented were not timely raised and that the said questions here raised are not substantial.

The Questions Are Not Timely Raised.

The Plaintiff seeking equitable relief should act equitably. The Plaintiff failed to do so—his complaint was filed September 7, 1962 and the election was scheduled for November 6, 1962. He waited to the very last possible moment to bring a judicial challenge. In preparing for an election, it is necessary and required for the state and county, that drawing of specifications of ballots (which differ in each municipality and often, in each ward) must be begun promptly so that sample ballots as well as official ballots may be prepared in time. This action was commenced on the eve of the date for drawings for position.

On March 8, 1962, which was the last day for the receipt of nominating petition for independent candidates, R. S. 19:13-9, R. S. 19:23-40, Plaintiff personally tendered his petition for filing to the Executive officer of the New Jersey Department of State. His petition contained on its face the designation "Life-Long Democrat". Plaintiff was then informed by the Executive officer that the designation was illegal and that the petition could not be accepted in that form. The Plaintiff was informed that he could have a designation including three words which did not include the names of established political parties.

He took no legal action until September 7, 1962, when this Complaint was filed. The General election was held November 6, 1962. It is untimely and the question is now moot.

The Questions Are Not Substantial.

The election has taken place. The question is moot. The Plaintiff was on the ballot. He received a place as did other independent candidates. The number of candidates running were few and his name was before the electorate for voting and the electorate voted.

The New Jersey Statute which prevents an independent candidate from using the word "Democrat" associated with his name on the ballot is constitutional.

The New Jersey Statutes provide three ways by which a candidate may have votes recorded for him at a general election. He may be nominated as a candidate of a party at a primary election. R. S. 19:13-1 et al. Then he may use his party's designation. R. S. 19:14-8 et al.

A candidate may also have his name printed on the general election ballot by means of a direct nomination by petition. R. S. 19:13-1, 3 to 13, et al. He may be referred to as an "Independent" candidate.

Or, a candidate may have votes recorded for himself on the general election by having his name written in or pasted on at the general election ballot. R. S. 19:14-6.

The United States Supreme Court has recognized the importance of the role which political parties play in our system of government and the validity of requirements of state law that party candidates run under their true colors. In *Ray* v. *Blair*, 343 U. S. 214 (1952), the Court stated:

> "As is well known political parties in the modern sense were not born with the Republic. They were created by necessity, by the need to organize the

rapidly increasing population, scattered over our Land, so as to coordinate efforts to secure needed legislation and oppose that deemed undesirable. Compare Bryce, Modern Democracies, p. 546. The party conventions of locally chosen delegates, from the county to the national level, succeeded the caucuses of self-appointed legislators or other interested individuals. Dissatisfaction with the manipulation of conventions caused that system to be largely superseded by the direct primary. * * *" At 220.

"* * * A state's or a political party's exclusion of candidates from a party primary because they will not pledge to support the party's nominees is a method of securing party candidates in the general election, pledged to the philosophy *and leadership* of that party. * * *" At 227. (Emphasis added.)

In that case the Court upheld an Alabama statutory scheme endorsing a bylaw of the Alabama Democratic Executive Committee requiring nominees for Democratic candidate for elector to pledge to vote for the presidential nominee of the Democratic national convention.

The Court discussed many statutory provisions for the regulation of primary elections and the selection of party candidates. It noted that the requirement of a pledge from a candidate participating in a primary election to support at the general election the winner of the primary election is not unusual. At 221. In footnote 8, the Court stated:

"Similar pledges, of course, are frequently exacted of *voters* in the primaries." (Emphasis added.)

In the context of the opinion it seems clear that the Court viewed the requirement of such pledges as constitutional.

Plaintiff, Voltaggio, voted in the Democratic primary in 1962. Under *Ray* v. *Blair* it would be constitutional for New Jersey to require Plaintiff to support in the general election the winner of the Democratic primary election for candidate in the Eleventh Congressional District. Not only does New Jersey not require Plaintiff to support the winner of the Democratic primary, it even permits Plaintiff to run against him. The only condition imposed on Plaintiff by New Jersey is that he may not have the words "Democrat" or "Democratic" printed immediately under his name on the general election ballot. New Jersey law does not prevent Plaintiff from advertising or publicizing to the electorate in any manner he sees fit what his past association with the Democratic party may have been. The only thing it prevents him from doing is to use the official general election ballot to ass rt that he is a Democrat when in fact he is not the candidate of the Democratic party.

Plaintiff implies that party candidates are given an unrestricted right to use a political slogan on the official ballot while independent candidates have a more limited right. This implication is the exact opposite of the truth. A party candidate has no right at all to have a slogan printed following his name on the official ballot. R. S. 19:14-6 and R. S. 19:49-2 (in the case of Automatic Voting Machines) provide that there shall be printed the name of the party to the left of the row. There is no provision for the printing of the name of the party or of any political slogan immediately in association with the name of any candidate of a party. The only words appearing in the block for a party candidate for a member of the House of Representatives are the name of the candidate. R. S. 19:14-8. That the

practice conforms to the statutory scheme is illustrated by a typical ballot from the most recent election for member of the House of Representatives from the 11th congressional district which is attached to this brief and marked Exhibit A.

An independent candidate is granted the right to have printed immediately following his name on the official ballot a designation of the "party" or principles which he represents. R. S. 19:14-10; R. S. 19:13-4. No decision of the United States Supreme Court has been found which holds that a candidate has a constitutionally protected right to have printed on the official ballot immediately following his name a designation of party or principles. The grant by New Jersey of this right to an independent candidate is over and above the constitutional minimum which it must afford. Therefore, it may impose any reasonable condition on the grant of this right. It seems self-evident that it is reasonable to impose as a condition that the designation chosen not include the very name of an established and well-known political party. If Plaintiff should eventually prevail and have the word "Democrat" printed closely following his name on the general election ballot there would then be discrimination against the Democratic candidate who has no right under New Jersey law to have any designation printed immediately following his name. Such discrimination against the Democratic candidate would be further aggravated if Plaintiff also prevailed on the other major point in the case and had his name placed in the area on the ballot where the experienced voter has come to expect the Democratic candidate's name to appear.

It is submitted that Plaintiff, when challenging the constitutionality of a statute, has the burden of showing that the Legislature could not reasonably have believed that the use of a slogan including the word "Democrat" would possibly confuse the electors. The Legislature has power to prevent the possibility of confusion under U. S. Const. Art. I, sec. 4, cl. 2.

Plaintiff submits no factual proof nor cites any case in which a statute similar to R. S. 19:13-4, protecting any established political parties from use of their names by other groups, was held violative of the Constitution of the United States.

In re Greene, 9 App. Div. 223, 41 N. Y. S. 177 (1896), permitted the use of the designations both "National Democratic Party" and "Democratic Party". But there was a long factual history in that case indicating that no single political group had become exclusively identified as the Democratic Party. This was a 3-2 decision, with a strong dissenting opinion. A much more recent case from the same state, *Marcantonio v. Hefferman*, 192 N. Y. Misc. 868, 83 N. Y. S. 2d 364 (1948), forbade the use of the designation "United Labor Party" as violative of a statutory provision practically identical with R. S. 19:13-4 protecting in that instance the right of the "American Labor Party", an established political party, against the use of any part of its name by another group. The Court distinguished the *Greene* case on the ground that no statute similar to R. S. 19:13-4 was involved in that case.

Philips v. Curtis, 4 Idaho 193, 38 P. 405 (1894), is not a case in which two similar names appeared on a ballot. Neither is it a case in which an established political party

invoked statutory protection of its name similar to that afforded by R. S. 19:13-4. There, petitions nominating independent candidates under the designation "People's Party" and "Electors' People's Party" were presented. The former petition was rejected by the filing office for formal defects not related to the name. The Court upheld this administrative determination. The administrative officer accepted for filing the petition of the "Electors' People's Party."

State v. *Gifford*, 22 Idaho 613, 126 P. 1060 (1912), may be distinguished on the same grounds as *Phelps* v. *Curtis*.

In *State* v. *Arms*, 24 Mont. 447, 63 P. 401 (1900), the designations "Bryan Democratic" and "Democratic" were both permitted on the ballot. Again, no statute similar to R. S. 19:13-4 was involved. The objectors could only rely on general equitable principles against confusion. But the factual history showed that both factions so designated were well known to the public and confusion would not occur. Each faction conducted its own convention and primary throughout the state.

For other examples of this approach by the Montana court, see *State* v. *Moran*, 63 P. 390 (1900) (forbidding the use of the designation "Eight Hour Republicans") and *State ex rel. Gillis* v. *Johnson*, 46 P. 440 (1896) (permitting the use of the designation "Silver Republican Party").

For general authority on the right of a party to protection against the use of its name by others, see *Fagan* v. *O'Connor*, 169 N. Y. Misc. 466, 8 N. Y. S. 2d 56 (Supreme Ct. 1938); Gassman, *Election Law*, Sections 43 and 87 (1957).

New Jersey Law makes no unconstitutional delegation of discretion to determine the position of candidates on the ballot.

The county clerk has no discretion in determining the sequence of positions of candidates for a given office on the general election ballot. R. S. 19:14-6 and R. S. 19:49-2 reserve the top rows on Automatic Voting Machines to parties which polled 10% of the total vote at the preceding election for members of the General Assembly, R. S. 19:1-1. At the present time, as a matter of fact there happens to be two such parties in New Jersey; the Republican Party and the Democratic Party. Thus the top two rows on Automatic Voting Machines are set aside under the existing facts and law for these two parties. The determination of which of the two parties gets the first row and which gets the second is determined by a drawing by lot according to a carefully specified statutory procedure. R. S. 19:14-12. The remaining rows are reserved for candidates nominated by petition, i. e., independent candidates such as plaintiff. R. S. 19:14-6. The sequence of positions on the ballot of independent candidates is also determined by a drawing by lot by the county clerks. R. S. 19:14-12. This is made particularly clear by consideration of the last paragraph of R. S. 19:14-12 which refers to "the drawing for the position which the name of candidates * * * nominated by petition * * * shall occupy on the general election ballot * * *." An earlier paragraph of this section reads in part: * *.

> "Where there is but one person to be elected to an office, the names of the several candidates *who have filed petitions* for such office shall be written upon cards of the same size, substance and thickness." (Emphasis added.)

This sentence can only refer to candidates nominated by petition. It would be contradictory if applied to party candidates whose place on the party row of an Automatic Voting Machine is reserved by the statutory provisions discussed above. The third paragraph of R. S. 19:14-8 also makes this clear. It is submitted that the statement in *Perry* v. *Guiliano*, 46 N. J. Super. 550 (App. Div. 1957), which may seem to imply that the county clerk need not determine the sequence of independent candidates by lot, but by some other method, is not the law in New Jersey. In *Perry* v. *Guiliano* plaintiffs sought to compel the county clerk to determine the sequence of positions of independent candidates by a manner other than by lot. Plaintiff was denied such relief. No New Jersey Court has ever held that the sequence should be determined in any other way than by lot. It is submitted that R. S. 19:14-12 and associated statutes make it clear that the sequence must be determined by lot. Any discretion as to position of independent candidates which the county clerk has does not include within its scope the sequence of the names.

In the present case the county clerk determined the sequence of independent candidates by lot.

Even if the New Jersey Legislature did delegate to an administrative officer some discretion in determining the sequence of independent candidates, this would not violate U. S. Constitution, Art. I, Sec. IV, Clause 1. This provision of the Constitution provides:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof . . . ."

Plaintiff urges a literal reading of the word "Legislature" in this provision as forbidding any delegation whatsoever by the Legislature to any other state agency. A contention that the word "Legislature" in this provision should be given a literal reading was expressly rejected by the Supreme Court in *Smiley* v. *Holm*, 285 U. S. 355 (1932). In that case the Minnesota Legislature passed a bill reapportioning the congressional districts. But the Governor vetoed it. Under the Minnesota Constitution, normally the Governor's veto would prevent a bill from becoming law. It was contended, however, that Article I, Sec. 4, Clause 1 of the United States Constitution superseded the State Constitution and delegated the power to regulate congressional elections to the Legislature to the exclusion of any participation by the Governor. The Court held that the term "Legislature" does not refer to the law-making "body" but to the law-making "function". At 365, the Court stated:

> "* * * We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted. Whether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state policy. Article 1, § 4, of the Federal Constitution, neither requires nor excludes such participation." At 367.

Similarly, it is a matter of State policy whether an administrative official may share the law-making function to the extent of making certain specific determinations.

Plaintiff has no constitutionally protected right to a chance to appear on the first row on the voting machine.

New Jersey law defines as a political party a party which at the preceding election for members of the General Assembly polled at least 10% of the total vote cast in the state. R. S. 19:1-1. To parties so defined it reserves the top rows on Automatic Voting Machines. R. S. 19:14-6 and 19:49-2. Other groups are not barred from placing the name of a candidate on the ballot. All they have to do to have the name of a candidate for Member of the House of Representatives printed on the ballot is to file a petition in proper form containing only 100 signatures. R. S. 19:13-3. This is a tiny fraction of the total population of the typical congressional district which averages about 400,000. It is only half the number of signatures which a candidate for the nomination of his party must obtain to get his name on the primary election ballot; R. S. 19:23-8 requires a candidate seeking his party's nomination for Member of the House of Representatives to file a petition with 200 signatures.

The United States Supreme Court has held that a state may keep a party and its candidates off the general election ballot altogether where they fail to meet a requirement of state law that they file petitions demonstrating substantial support. *MacDougall v. Green*, 335 U. S. 281 (1948). In that case Illinois required a petition containing at least 200 signatures from each of at least 50 of the 102 counties in the state. When the Progressive Party failed to satisfy this requirement, Illinois ruled that the nominating petition was "not sufficient in law to entitle the * * * candidates' names to appear on the ballot." The Court upheld this ruling.

New Jersey has imposed no such drastic requirement on independent candidates. Plaintiff could have earned a place in the top rows in the 1962 general election by being sponsored by a group which in 1961 polled 10% of the total vote in the state. Having failed to demonstrate such support in advance, New Jersey does not keep him off the ballot altogether as Illinois did to the candidates in *MacDougall* v. *Green*; it still permits him to have his name on the ballot by filing a petition with only half as many signatures as the party candidates had to file. Since New Jersey's treatment of independent candidates in these respects is less drastic than that of Illinois which was held constitutional in *MacDougall* v. *Green*, it also should be held constitutional.

New Jersey law does attempt to afford the independent voter facilities for prompt, intelligent and ready expression of his voice. New Jersey mails a sample ballot to each registered voter several days prior to the general election, R. S. 19:14-25, which is a facsimile of the official ballot appearing on the voting machine, R. S. 19:49-4 and R. S. 19:14-22. There is no constitutional requirement that sample ballots be mailed to each registered voter. Many states do not use sample ballots. By mailing out sample ballots, New Jersey provides every voter, whether an independent or a member of a party, with a full opportunity to study the ballot and determine the position of the candidates for whom he intends to vote. It may also be noted that the possibility of difficulty in locating the name of a candidate on a general election ballot in the Eleventh Congressional District of New Jersey is practically non-existent. It is a relatively short, clear ballot unlike those of some other states. See Exhibit A to this brief.

It is submitted that *in vacuo* one block on the ballot is just as attractive to the voter as any other. The Court may take judicial notice of the fact that Vincent R. Impellitteri was elected mayor of the City of New York running on row G on Automatic Voting Machines in 1950. However, since for many years in New Jersey the law has provided that the top rows on Automatic Voting Machines shall be reserved to parties which obtain 10% of the vote at the preceding election for members of the General Assembly, the electorate has come to expect that the party rows will be at the top of the ballot and the independent rows will be below them. To frustrate this expectation now would cause confusion to the electorate. He was not denied the opportunity; he could have run with other candidates for first position; he excluded and precluded himself by refusing to enter the primary—a condition precedent to qualifying for the drawing.

There is no proof submitted that No. 1 position guarantees lesser or greater votes. The political parties of this state cannot receive immunity against loss merely by the first position on the ballot.

The plaintiff did not enter the primary for fear he would have been eliminated and did not want to have a contest for the designation for the office.

In *McGowan* v. *State of Maryland*, 366 U. S. 420, 81 S. Ct. 1101 (1961). Defendants appealed convictions of violating Sunday closing laws, claiming that the statutes bring about a denial of equal protection of the laws and due process. This court held that the Fourteenth Amendment permits States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others;

the constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective; State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality; a statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Also in *Williamson* v. *Lee Optical Co.*, 346 U. S. 483, 75 S. Ct. 461, 99 L. Ed. S. 63, an Oklahoma statute was attacked as contra the Equal Protection Clause of the 14th Amendment because it forbids an optician from fitting or duplicating lenses without a prescription but that it did not apply to sellers of ready-to-wear glasses. Here it was held that the traditional test under the Equal Protection Clause has been whether a state has made "an invidious discrimination". Universal equality is not the test, there is room for weighing. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

Conclusion.

For the reasons stated it is respectfully submitted that the Supreme Court of the United States dismiss this Appeal and affirm the decision of the Court below.

Respectfully submitted,

NICHOLAS T. FERNICOLA,
Attorney for Defendant-Appellee,
Hall of Records,
Newark, New Jersey.

Proof of Service.

I, Nicholas T. Fernicola, attorney for Nicholas V. Gaputo, Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on November 15, 1962, I served a copy of the foregoing Appellee's Motion to Dismiss Appellant's Appeal and Notice of Motion to Dismiss, by mailing 5 copies in duly addressed envelope, Certified Mail, Return Receipt Requested, as follows.

1. On Abraham I. Harkavy, attorney for Samuel Voltaggio, Appellant, 100 Evergreen Place, East Orange, New Jersey.

Exhibit A.

Voting Machine Sample Ballot.
General Election, November 8, 1960.

(See Opposite ☞)

City of East Orange

[illegible] WARD

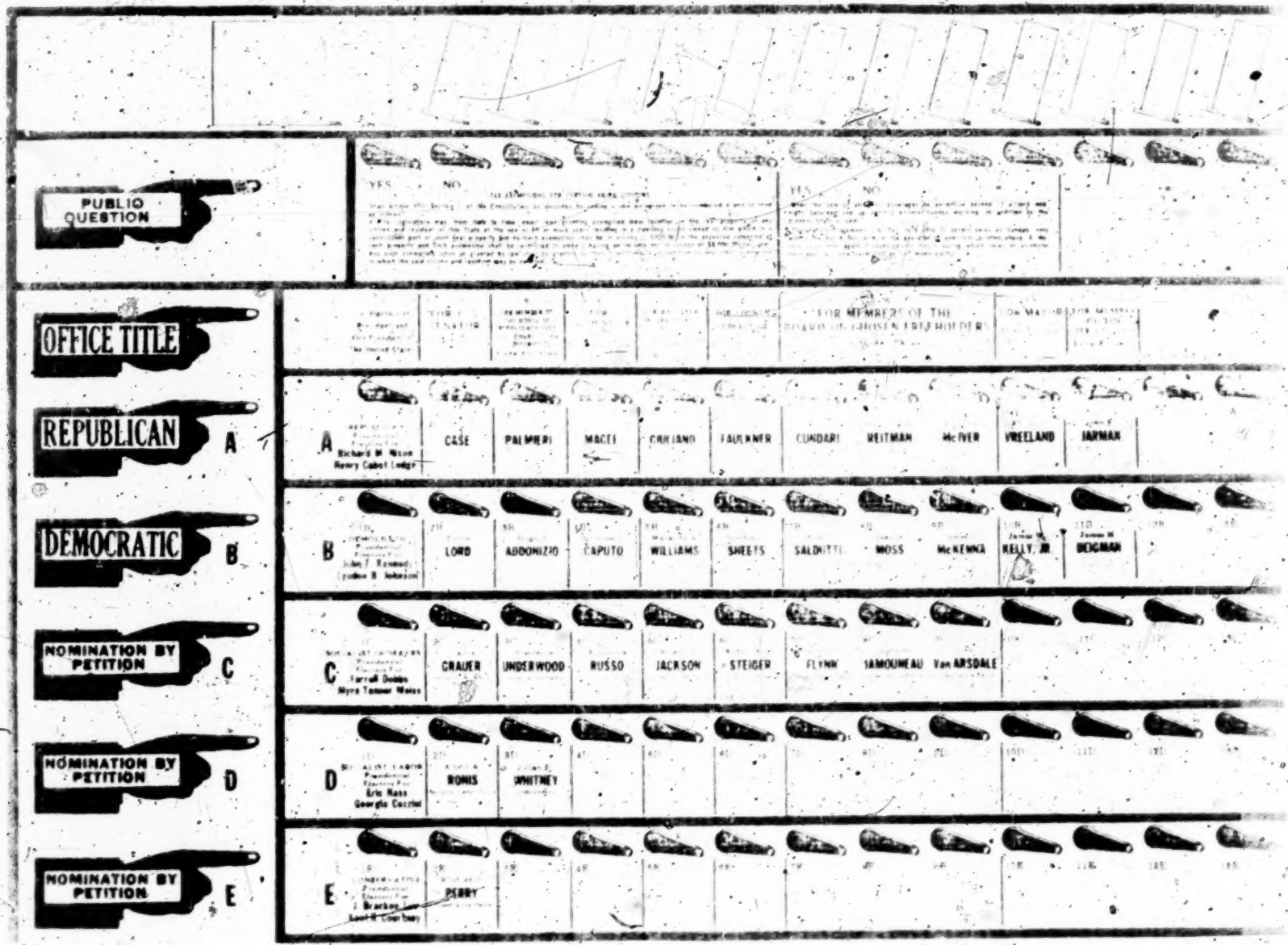
SECOND ELECTION DISTRICT

The Polling Place for this District is Disciples of Christ Church, 78 Park Avenue

VOTING MACHINE SAMPLE BALLOT

General Election, November 8, 1960

(POLLS OPEN FROM 7 A.M. TO 8 P.M.)



(POLLS OPEN FROM 7 A.M. TO 8 P.M.)

PUBLIC QUESTION

OFFICE TITLE

REPUBLICAN A

DEMOCRATIC B

NOMINATION BY PETITION C

NOMINATION BY PETITION D

NOMINATION BY PETITION E

A	CASE	PALMER	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	WELLAND	[illegible]	
B	LORD	ADDONIZIO	CAPUTO	WILLIAMS	SHEETS	SALDITT	MOSS	McKENNA	KELLY, JR	[illegible]	
C	CRAIER	UNDERWOOD	RUSSO	JACKSON	STEIGER	FLYNN	[illegible]	[illegible]			
D	BOWIS	WHITNEY									
E	PERRI										

VOTERS ATTENTION!

[illegible] yourselves with this ballot and instructions [illegible] detail prior to voting and save time on Election Day.

IMPORTANT!

All voters who can should vote early in the day and thus avoid possibility of congestion and inconvenience to themselves and others near the close of the polls.

INSTRUCTIONS TO VOTERS